

Internal Revenue Service

memorandum

CC:TL-N-6370-90

Br4:HGSalamy/VAMoore

date: **MAY 30 1990**

to: District Counsel, Brooklyn CC:BRK
Attn: P. Gartenbaum

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject:  v. Commissioner
Dkt. No. 

This is in response to your April 25, 1990, request for formal tax litigation advice in the above-entitled case. After several conversations with your trial attorney Peggy Gartenbaum and researching the issue informally with attorneys in the Office of the Assistant Chief Counsel (Income Tax and Accounting), CC:IT&A, we thought it best to provide you with our preliminary views at this time.

ISSUE

Whether an assessment made solely on the basis of a taxpayer's execution of a Form 906, Closing Agreement as to Specific Matters, is valid.

CONCLUSION

The August 12, 1986, Technical Assistance Memorandum issued to the Chief, Examination Division, North-Atlantic Region, by the Director, Individual Income Tax Division, which formed the basis for the practice which raised the issue, was withdrawn later in a March 16, 1987, memorandum, copy of which is attached for your information. Apparently, the August 12, 1986, memorandum received wide distribution but the March 16, 1987, memorandum did not. The March 16, 1987, memorandum recommends that until a definitive Service position can be decided upon, notices of deficiency (or waivers) should be obtained in Form 906 circumstances. As far as we can tell, that was the last word on the issue in the National Office until our receipt of your request for formal tax litigation advice.

DISCUSSION

We understand that the basis for the position in the August 12, 1986, Technical Assistance Memorandum is Request for Legal Opinion, G.C.M. 33320 (CC:I-I-2139, August 25, 1966). That G.C.M., a complete copy of which is attached, deals with the finality aspects of closing agreements under specified circumstances.

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The discussion on pp. 13-14 deals with the issue here in general terms. Admittedly, G.C.M. 33320 is dated and the legal conclusions reached therein may not be valid today. Accordingly, we are formally coordinating this issue with CC:IT&A. Because it may be some time before a definitive position can be agreed upon, we are proceeding with this response to you.

As respects the [REDACTED] case, since no notice of deficiency was issued (or waiver obtained), we orally informed you of our agreement with your moving to have the petition dismissed. As respects the issue generally, we note first that this is non-TEFRA matter as reflected in footnote one of your incoming request. Yet, since the August 12, 1986, advice appears to be in widespread use administratively, we suggest that you request the Service Center or Examinations Division to again follow the technical assistance route (as was done in 1986) to obtain guidance. That way the issue will be addressed on both the Chief Counsel side and the administrative side of the Service. More importantly, such a technical assistance inquiry will focus on the need to stress interim actions on a Service-wide basis.

As to whether the Service will as a matter of law defend an assessment made solely on the basis of a Form 906 in the proper forum (probably a refund suit), we will not be able to come a decision until CC:IT&A has completed its review and coordinated its proposed conclusion with this division.

MARLENE GROSS
Assistant Chief Counsel
(Tax Litigation)

By: H. G. Salamy
HENRY G. SALAMY
Chief, Branch No. 4
Tax Litigation Division

Enclosures:
cc G.C.M. 33320
cc 3/16/87 memo